

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN GROSSMAN,

Plaintiff-Appellant,

and

FIRST UNION NATIONAL BANK,

Intervening Plaintiff,

v

ARNETHA P. WELLS, ARTHUR LISS,
ESQUIRE, MARY WALKER, AMERICAN
INSURANCE COMPANY, and MITCHELL
GROSSMAN,

Defendants,

and

LISS & ASSOCIATES, P.C.,

Defendant-Appellee.

UNPUBLISHED

January 11, 2007

No. 263634

Oakland Circuit Court

LC No. 1999-016225-NI

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting a directed verdict in favor of defendant, Liss & Associates, P.C. ("defendant"), and denying plaintiff's posttrial motions for a new trial or relief from judgment. We reverse the order directing a verdict in favor of defendant and remand for further proceedings.

I. FACTS

This action arises from the alleged negligence of Arnetha Wells, a legal secretary and notary public employed by defendant. Plaintiff alleged that Wells notarized plaintiff's forged signature on a document that purported to assign plaintiff's interest in commercial property to

plaintiff's ex-husband, Mitchell Grossman, a former client of defendant's law firm. In a prior appeal, this Court reversed an order granting summary disposition in favor of defendant, concluding that there was an issue of fact whether Wells was acting within the scope of her employment with defendant such that defendant could be held liable under a respondeat superior theory of liability. *Grossman v Liss & Assoc*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 2003 (Docket No. 234322), slip op at 6-7. On remand, the case proceeded to a jury trial. At the close of proofs, the trial court directed a verdict in favor of defendant, concluding that the evidence failed to show that Wells was acting within the scope of her employment with defendant when she notarized plaintiff's forged signature. The court later denied plaintiff's posttrial motions for relief from judgment or a new trial. Plaintiff now appeals.

II. LAW OF THE CASE

Plaintiff first argues that, in light of this Court's prior decision in *Grossman, supra*, the law of the case doctrine compelled the trial court to deny defendant's motion for a directed verdict. We disagree.

A. Standard of Review

Whether the trial court erred by failing to follow an appellate ruling on remand is a question of law that we review de novo. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998).

B. Analysis

As this Court explained in *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), "[w]hen this Court reverses a case and remands it for trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." That is what occurred here. In the prior appeal, this Court reversed a summary disposition order because it concluded that the evidence established a question of fact whether Wells was acting within the scope of her employment. The prior appeal was not decided on the merits. Therefore, the law of the case doctrine does not apply.

III. DIRECTED VERDICT

Next, plaintiff argues that the trial court erred in directing a verdict in defendant's favor. We agree.

A. Standard of Review

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). The evidence and all legitimate inferences should be reviewed in the light most favorable to the nonmoving party, and the motion should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Id.*

B. Analysis

As this Court explained in its first decision:

Under the doctrine of respondeat superior, an employer may be vicariously liable for an employee's action that is committed within the scope of his or her employment. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). The employer cannot be held liable for an act committed by the employee, where the act is beyond the scope of their employment. *Borsuk v Wheeler*, 133 Mich App 403, 410; 349 NW2d 522 (1984). An employer is not liable if the employee's tortious act is committed while the employee is working for the employer but the act is outside her authority. *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989). There is no vicarious liability if the employee steps aside from her employment to gratify some personal animosity or to accomplish some purpose of her own. *Id.* at 446-447. An employer can be held liable under the doctrine of respondeat superior, where the employee could in some way have been promoting or furthering the employer's business. *Bryant v Brannen*, 180 Mich App 87, 98-99; 446 NW2d 847 (1989). An employer may be liable if the employee commits a tort while involved in a service of benefit to the employer. See *Kester v Mattis, Inc*, 44 Mich App 22, 24; 204 NW2d 741 (1972). Vicarious liability may arise even where the employee's action was not specifically authorized if the act is nevertheless so similar to or incidental to the conduct that is authorized, taking into consideration such matters as whether the act is commonly done by the employee. *Bryant, supra* at 99-100, quoting 1 Restatement Agency, 2d, § 229, p 506. The determination whether an employee is acting within the scope of his or her authority is generally a question of fact for the jury. *Green, supra* at 447; *Rowe v Colwell*, 67 Mich App 543, 549-550; 241 NW2d 284 (1976). [*Grossman, supra*, slip op at 5.]

In *Bryant, supra* at 99-100, this Court noted that 1 Restatement Agency, 2d, § 229, p 506, provides:

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

Here, viewing the evidence in a light most favorable to plaintiff, a jury could have concluded that Wells's action in notarizing the assignment was of the same general nature as conduct that defendant authorized, and that many of the Restatement factors supported a determination that Wells was acting within the scope of her employment. Specifically, the evidence showed that Wells commonly notarized documents, with defendant's permission, and that the improper act also was one of notarization (factors a, c and g). The evidence also supported a finding that the improper notarization took place at defendant's office for a perceived client (factor b), and that notarization of documents permitted defendant to engage in its enterprise and was arguably within that enterprise (factor e). There was nothing suggesting that Wells's departed from her normal method of notarizing documents (factor i).

Moreover, the following observation by this Court in *Grossman, supra*, slip op at 6, remains applicable:

Based on the fact that Grossman had been a prior client, and thus a potential future client, was a personal friend of the boss, and had use of the law office, there is a genuine issue of fact regarding whether Wells' action was promoting or furthering the business of the law office; therefore, there exists a factual issue whether she was acting within the scope of her employment.

Finally, there was no evidence suggesting that Wells acted to gratify some personal animosity or to accomplish some purpose of her own. See *Bryant, supra* at 98.

For these reasons, we conclude that the trial court erred in directing a verdict in defendant's favor. The question whether Wells was acting within the scope of her employment should have been resolved by the trier of fact. Accordingly, we reverse and remand for a new trial.

In light of our conclusion, we decline to address plaintiff's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Mark J. Cavanagh

/s/ Bill Schuette